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In The
# Supreme Court of the United States
October Term, 1985

CRAIG VEVODA, KENNETH CHAMNESS AND MARK SOTTANA,
*Petitioners,*

vs.

MILK DRIVERS AND DAIRY EMPLOYEES UNION, TEAMSTERS LOCAL 302,
*Respondent.*

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

In opposition to the Petition for Writ of Certiorari (hereinafter "Petition"), Milk Drivers and Dairy Employees Union, Teamsters Local 302 (hereinafter "Local 302" or "Union") has attempted to characterize the issues presented for review as factual rather than legal. The Union's limited legal rebuttal is premised on a definition of the duty of fair representation uniformly rejected by every federal court. Moreover, since the filing of the Petition, the Eighth Circuit Court of Appeals in *Chavez v. United Food & Commercial Workers Union*, — F.2d —, 121 LRRM 2054 (1985), has joined its sister circuits in extending the duty of fair representation to a union's misrepresentations.

### I

### JUDICIAL JURISDICTION OVER CLAIMS FOR BREACH OF THE DUTY OF FAIR REPRESENTATION ENCOMPASSES THE DEFENSE INTERPOSED TO THE UNION'S CONTRACT ENFORCEMENT ACTION.

Local 302 does not dispute that federal courts have equal and concurrent jurisdiction with the National Labor Relations Board (NLRB) over claims for breach of the duty of fair representation. *Vaca v. Sipes*, 385 U.S. 171 (1967). In light of this admission, the Union's (as well as the Ninth Circiut's) conclusion that NLRB jurisdiction "preempts" the contract defense raised by petitioners is both irrelevant and incongruous. The question is not whether the defense involves conduct arguably subject to NLRB regulation, but rather, whether the district court's concurrent jurisdiction allows it to conclude that the Union's conduct violated the duty of fair representation owed petitioners thereby invalidating the contract in issue.

Local 302 attempts to confine the duty of fair representation to actions based "on the negotiation of a collective bargaining agreement . . . [or] the handling of a grievance which the Union controls by virtue of its status as [the employees'] exclusive representative." (Opposition, p. 11.) No federal court has ever found the duty of fair representation to be so circumscribed. In fact, this Court expressly held to the contrary in *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 299 (1971), a case which the Union does not even attempt to distinguish.

As set forth in the Petition (pp. 10-12), the lower federal courts have, until now, been unanimous in permitting employees to maintain actions for breach of the duty of fair representation even in the absence of an accompanying breach of a collective bargaining agreement. The Eighth Circuit has joined its sister circuits in sustaining such a claim. In *Chavez v. United Food & Commercial Workers Union, supra,* the court found a breach of the duty where a union induced employees to strike by falsely stating that striking employees would be unfair labor practice strikers and therefore not subject to permanent replacement.

Unquestionably, if the petitioners had sued Local 302 asserting that the Union misled them into believing they were required to become full members as a condition of continued employment, a federal court would have had jurisdiction to entertain the action under Section 301 of the LMRA. Th Ninth Circuit's contrary conclusion flies in the face of law established by this Court and applied by every other circuit court of appeals. In particular, it is directly contrary to the Fourth Circuit's decision in *Beck v. Communication Workers,* — F.2d —, 120 LRRM 2957

(1984). Local 302's meager effort to distinguish *Beck* on the basis that different facts were involved is a telling commentary on the applicability of the legal principles espoused in *Beck* to the facts present in this case.

The purpose of the preemption or primary jurisdiction doctrine is to divine the intent of Congress. *Fidelity Federal Savings & Loan Assn. v. De La Cuestra,* 458 U.S. 141, 152-153 (1982). Repeatedly this Court has noted Congress' reluctance to regulate the union-member relationship except in very limited circumstances. *NLRB v. Boeing Co.,* 412 U.S. 67 (1973); and *Vaca v. Sipes, supra.* To sustain the Ninth Circuit's refusal to consider an element critical to the establishment of an enforceable contractual relationship—the voluntary undertaking of the obligation—is to attribute to Congress an intent never contemplated.

## II

## FAILURE TO CONSIDER THE VALIDITY OF THE UNDERLYING CONTRACT WOULD MAKE THE FEDERAL COURTS PARTIES TO AN ILLEGAL CONTRACT.

Federal courts may not enforce contracts which violate federal law. *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 83 (1982). Since the filing of the Petition, another court has joined the First Circuit and a New Jersey District Court (Petition, p. 13) in holding that an illegal contract cannot be enforced. *Clapesattle v. Sheet Metal Workers, Local 503,* 120 LRRM 3503 (S.D. Ind. 1985).[1]

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[1] Apparently this case was not officially reported. It was unofficially reported subsequent to the filing of the instant Petition.

Local 302 defends the Ninth Circuit's limiting of *Kaiser Steel* to attacks on particular contractual provisions by merely reiterating the Ninth Circuit's holding that *Kaiser Steel* does not permit the federal courts to interpret the LMRA. (Opposition, p. 10.) Quite obviously, allowing federal courts to enforce contracts which, as a whole, are illegal is inconsistent with the governing principle of *Kaiser Steel.* Applying Section 8(e) of the LMRA (29 U.S.C. §158(e)) to the contract at issue in *Kaiser Steel* required no less an interpretation of the LMRA than does the defense interposed in this action.

Barring judicial enforcement of a contract does not adversely affect the NLRB's jurisdiction to provide *affirmative* relief for violations of the LMRA. *Kaiser Steel, supra,* at 86. The district court properly noted this distinction. (Petition, p. B6.) Nothing in the district court's judgment regulates Local 302's conduct, nor did the district court attempt to provide petitioners with affirmative relief. The Ninth Circuit's reversal puts it squarely in the position of enforcing an illegal contract.

## III

## NO FACTUAL ISSUES ARE PRESENTED WHICH REQUIRE REVIEW BY THIS COURT.

Aware of the tenuous nature of the Ninth Circuit's reasoning, Local 302 focuses its opposition on a procedural objection. The Union claims that the Ninth Circuit made a factual finding that the Union's statements were not fraudulent. Local 302 reasons that this factual finding constitutes an "independent basis" for sustaining the Ninth Circuit's decision, thus precluding review. (Opposition, p. 7.)

Local 302 errs in classifying the Ninth Circuit's holding as a factual finding. The Ninth Circuit was reviewing a grant of summary judgment based on an uncontroverted factual record. ". . . [I]n granting or denying summary judgment, a district court *by definition* makes a determination of law rather than fact . . ." (Emphasis added.) *Liberty Lobby, Inc. v. Anderson,* 746 F.2d 1563, 1572 (D.C. Cir. 1984). "For summary judgment, fact finding is an *inappropriate* exercise, at *either* the appellate or district court level." (Emphasis added.) *Lamelson v. TRW, Inc.,* 760 F.2d 1254, 1260 (Fed. Cir. 1985). No factual findings are presented for review.

In any case, Local 302's assertion that "[i]t is inappropriate for this Court to overturn factual conclusions of the courts of appeal . . ." is also incorrect. (Opposition, p. 7.) This assertion is apparently based on the "two court rule" discussed in the treatise cited by Local 302, Wright, Miller and Cooper, *Federal Practice and Procedure,* Vol. 17, § 4036, p. 31 (West, 1978). However, Local 302 fails to state that this rule is inapplicable when the dictrict court and the court of appeal have reached opposite conclusions. *Id.,* pp. 32-33, nn. 82, 84. "Where the court of appeals has reversed the judgment of the district court, the Supreme Court stands in the same position to the district court's findings as did the court of appeals, and may accept the determination of the district court which was reversed by the court of appeals . . ." "Federal Courts", 36 C.J.S. § 204(21), p. 670. Local 302 cannot present review of the important legal principles involved by denominating the Ninth Circuit's conclusions as findings of fact. *See generally Baumgartner v. U.S.,* 322 U.S. 665, 670-671 (1944); and *Offut v. U.S.,* 348 U.S. 11, 15 (1954).

The Ninth Circuit's decision ratifies the right of a union to engage in deceit. Established federal law as well as California law bars such conduct by a fiduciary. (Petition, pp. 17-22). Despite hundreds of years of common law governing the formation of contracts, no case has yet been cited that sanctions the misrepresentations made to petitioners by Local 302. For the first time, a federal court approves the right of a contractual party to engage in deceit. Such a principle has no place in federal jurisprudence, and even less of a place in the lives of common working men in their relationship to their unions.

## IV

## CONCLUSION

Granting certiorari is necessary to determine (1) whether jurisdiction to consider the validity of the union-member relationship is exclusively commited to the NLRB; and (2) if not, whether a union may fine employees thousands of dollars where it induced the membership obligation through misrepresentations. For the aforesaid reasons, it is respectfully submitted that the prayed for Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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